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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

CARL ZEISS AG and ASML
NETHERLANDS B.V.,

Plaintiffs,

v.

NIKON CORPORATION and
NIKON INC.,
Defendants.

Case No. 2:17-cv-03221-RGK (MRWx)

**PLAINTIFFS' OBJECTIONS TO
DEMONSTRATIVE EXHIBITS FOR
MS. JULIE DAVIS**

Trial Date: July 11, 2018

Time: 9:00 a.m.

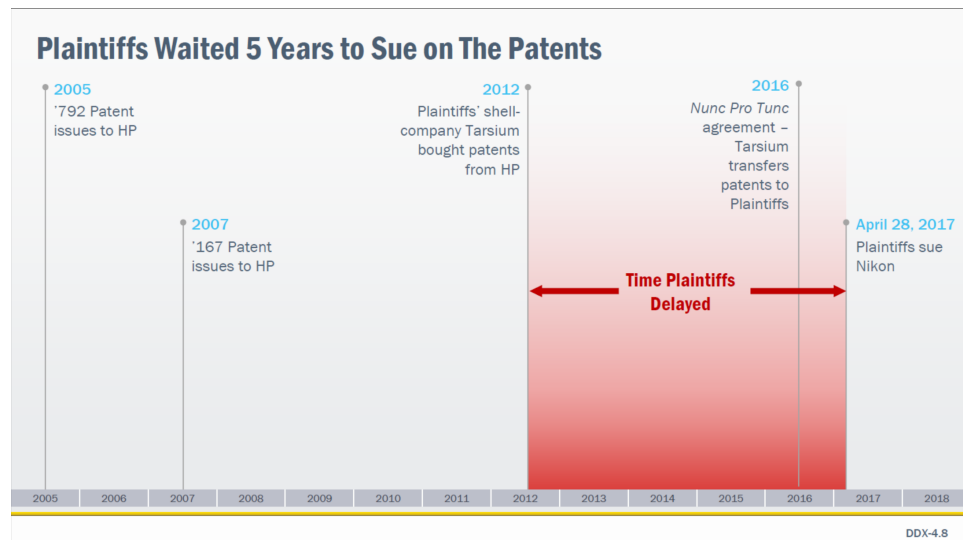
Courtroom: 850

Judge: Hon. R. Gary Klausner

Plaintiffs Carl Zeiss AG and ASML Netherlands B.V. (“Plaintiffs”) hereby offer written objections to three demonstrative exhibits that Defendants Nikon Corporation and Nikon, Inc. (“Nikon” or “Defendants”) intend to use with their damages expert and to the testimony Plaintiffs anticipate will accompany these demonstratives.

Plaintiffs objections are as follows:

DDX-4.8



Plaintiffs object to this demonstrative on several grounds. First, Plaintiffs object to this demonstrative and the testimony that Plaintiffs expect will accompany it as expert opinion that was not previously disclosed. During negotiations, counsel for Nikon has contended that it plans to argue that Plaintiff's alleged delay in bringing suit relates to the value of the patents. Ms. Davis's report, though, contains no such opinion, nor has such an opinion ever been disclosed in this litigation up until Thursday evening. Indeed, the slide contains no citations to anything from Ms. Davis's report (and in fact shows no citations for any of the contentions in the slide). An expert's report is supposed to provide "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(1). Allowing Nikon to present this new expert opinion only disclosed for the first time in the middle of trial will be highly prejudicial to Plaintiffs, and thus this demonstrative and testimony expressing this new theory should be excluded. *See* Fed. R. Civ. P. 37(c)(1); *see also Yeti by Molly, Ltd. v.*

1 *Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (“Rule 37(c)(1) gives teeth to
2 [the requirements of Fed. R. Civ. P. 26(a)(2)(C)] by forbidding the use at trial of any
3 information required to be disclosed by Rule 26(a) that is not properly disclosed.”)

4 To the extent that Nikon argues that Ms. Davis’s report contains citations to
5 documents showing the transfer of the ownership of the patent, that is not sufficient.
6 Rules 26 requires more than just citation of documents, it requires “**complete**”
7 disclosure of “**all opinions** the witness will express.” Fed. R. Civ. P. 26(a)(2). Plainly,
8 citation to documents in various portions of a report does not make an **opinion**, and
9 Nikon cannot be allowed to pick and choose from various data points appearing in
10 different portions of Ms. Davis’s report and then construct out of whole cloth a new
11 damages theory in the middle of trial. That a similar slide may have been shown in
12 Nikon’s opening demonstratives for an entirely different purpose similarly does not
13 justify using a similar slide to make a new argument constructed for the first time in the
14 middle of trial.

15 Second, Plaintiffs object to the use of the word “shell” to describe the corporate
16 entity that purchased the patents-in-suit from HP. As this Court already recognized in
17 granting Plaintiffs’ motion *in limine* No. 2, this language is inflammatory and likely to
18 unfairly plaintiffs. (*See* D.I. 274, at 7 (Plaintiffs’ motion *in limine* number 2) at 7 (asking
19 that the Court preclude “[a]llegations that, in words or in substance, Tarsium is a ‘secret’
20 **or ‘shell’** corporation ...” (emphasis added)); D.I. 480, at 2 (“Plaintiffs’ Motion in
21 Limine 2 [239] is granted.”)). Describing Tarsium as a “shell” company is also
22 misleading and inaccurate. Nikon has indicated that it will remove the reference to
23 Tarsium as a “shell” company on this slide, but Plaintiffs have not yet seen an updated
24 version of the slide reflecting this change.

25 Lastly, to the extent that Nikon withdraws this slide but then attempts to elicit
26 testimony on this same subject, Nikon should be precluded from doing so for the same
27 reasons that make the demonstrative exhibit objectionable.

1 **DDX-4.35**

2 Plaintiffs additionally object to DDX-4.35, a slide entitled “Plaintiffs Wanted the
3 HP Agreement to Be Secret.” As the Court has already recognized, “statements or
4 suggestions that Tarsium was formed for any improper purpose, *to keep acquisition*
5 *secret, and/or that the acquisition negotiations were conducted under*
6 *confidentiality agreements*” have no place in this trial. (*See* D.I. 274, at 7 (emphasis
7 added); *see also* D.I. 480, at 2 (“Plaintiffs’ Motion in Limine 2 [239] is granted.”))

8 Nikon contends that this Court granted Plaintiffs’ motion *in limine* No. 2 subject
9 to an exception for reasonable royalties. (*See, e.g.*, D.I. 483, at 1.) Plaintiffs note,
10 however, that the Court’s minute order from the beginning of trial made no such
11 reservation, despite doing so for orders on other motions *in limine*. (*See* D.I. 480, at 2.)
12 In any event, whether negotiations were conducted under a confidentiality agreement
13 has no relevance to calculating an appropriate reasonable royalty, and allowing such
14 testimony would be highly prejudicial and misleading because it is in fact common
15 practice for parties to negotiate under confidentiality agreements and all of the parties to
16 the negotiations knew of the identify of Plaintiff ASML and its connection to Tarsium,
17 as pointed out in Plaintiffs’ original motion. (*See* D.I. 274, at 8–9 (referencing testimony
18 of Mr. Pressman, attached as Ex. D to that motion).) Nikon has indicated it will not use
19 this slide, but Plaintiffs have not yet seen an updated slide deck and, regardless of
20 whether Nikon uses such a demonstrative, Plaintiffs object to any testimony that might
21 be elicited to this effect.

22 **Other Demonstratives**

23 Lastly, Plaintiffs note that Nikon’s originally served demonstrative exhibits for
24 Ms. Davis included additional inflammatory slides that squarely fall within the scope of
25 Plaintiffs’ motion in limine number 2. In negotiations, Nikon indicated that it would
26 withdraw the offending slides, but Plaintiffs have not yet received an updated set of
27 demonstratives with these materials removed. To the extent that Nikon publishes slides
28 that it previously indicated it would remove, Plaintiffs object to their inclusion.

1 Dated: July 15, 2018

FISH & RICHARDSON P.C.

2 By: /s/ Christopher S. Marchese

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on July 15, 2018, to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civil Local Rule 5.4. Any other counsel of record will be served by electronic mail, facsimile and/or overnight delivery.

/s/ Christopher S. Marchese

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